REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

1. REPORT DATE *(DD-MM-YYYY)*	2. REPORT TYPE	3. DATES COVERED *(From - To)*
16 May 2003	FINAL	

4. TITLE AND SUBTITLE

Potential Effects of the International Criminal Court on Future Military Operations (U)

5a. CONTRACT NUMBER

5b. GRANT NUMBER

5c. PROGRAM ELEMENT NUMBER

6. AUTHOR(S)

CDR Joseph F. Murray, NC, USN

Paper Advisor (if Any):

5d. PROJECT NUMBER

5e. TASK NUMBER

5f. WORK UNIT NUMBER

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

Joint Military Operations Department
Naval War College
686 Cushing Road
Newport, RI 02841-1207

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)

10. SPONSOR/MONITOR'S ACRONYM(S)

11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION / AVAILABILITY STATEMENT

Distribution Statement A: Approved for public release; Distribution is unlimited.

13. SUPPLEMENTARY NOTES A paper submitted to the faculty of the NWC in partial satisfaction of the requirements of the JMO Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.

14. ABSTRACT

Effective 1 July 2002, the International Criminal Court (ICC) became reality and, as such, is now an important element of the international legal arena. In the future the ICC may have a significant influence on U.S. military operations. The combatant commander must be aware of the potential impact of the ICC on military leaders and their service members. There is the possibility for unfriendly countries and NGOs to challenge future United States military operations through the threat of ICC prosecution. Although the United States has not ratified the ICC statute, the ICC may still impact our military operations in several different ways. It may generate unfavorable political publicity for the United States, as well as for individual commanders and military members, via investigations of military operations.

15. SUBJECT TERMS

International Criminal Court; Military Operations; Effects; Threat

16. SECURITY CLASSIFICATION OF: Unclassified			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			Chairman, JMO Dept
UNCLASSIFIED	UNCLASSIFIED	UNCLASSIFIED			19b. TELEPHONE NUMBER *(include area code)* 401-841-3556

Standard Form 298 (Rev. 8-98)

UNCLASSIFIED

NAVAL WAR COLLEGE
Newport, R.I.

POTENTIAL EFFECTS OF THE INTERNATIONAL CRIMINAL COURT ON FUTURE MILITARY OPERATIONS

By

Joseph F. Murray
CDR, NC, USN

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Joint Military Operations Department.

The contents of this paper reflect my own views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: _____

16 May 2003

Douglas Hime, Professor, NWC

Derek Offer, CAPT, USN, Instructor, NWC

ABSTRACT

Effective 1 July 2002, the International Criminal Court (ICC) became reality and, as such, is now an important element of the international legal arena. In the future the ICC may have a significant influence on U.S. military operations. The combatant commander must be aware of the potential impact of the ICC on military leaders and their service members. There is the possibility for unfriendly countries and NGOs to challenge future United States military operations through the threat of ICC prosecution. Although the United States has not ratified the ICC statute, the ICC may still impact our military operations in several different ways. It may generate unfavorable political publicity for the United States, as well as for individual commanders and military members, via investigations of military operations. The ICC may also make military personnel vulnerable to legal prosecution for perceived war crimes that occur in future operations conducted outside the United States. Extradition requests from these indictments may cause difficulties for coalition warfare. The United States cannot let the agenda of other countries or NGOs, working through the ICC or any agency, interfere with important U.S. foreign policy objectives. When these policy objectives include military operations, the United States must seek to protect our forces by insisting on immunity from prosecution by the ICC and in the long-term work through the United Nations to change the statutes of the ICC. Commanders are obligated to ensure that targeting and ROE details are emphasized and factored into the planning and training process in all future operations. As U.S. battlefield technology improves, so do the expectations for less collateral damage. To meet these expectations, military doctrine that addresses these issues may need to be strengthened. Operational commanders must emphasize sound training, maximization of

intelligence and the resource allocation necessary to reasonably protect non-combatants yet complete the mission.

INTRODUCTION

On March 20, 2003, President George W. Bush ordered General Tommy Franks to commence Operation Iraqi Freedom in an attempt to rid Iraq of the regime of Saddam Hussein. Operation Iraqi Freedom was executed without United Nations Security Council authorization because three permanent members, France, Russia and China, opposed it. Under the new International Criminal Court (ICC),[*] there is the potential that George W. Bush and General Franks, as well as other field commanders, could be prosecuted for "war crimes," "crimes of aggression" and "crimes against humanity" for operations such as Iraqi Freedom. Whether or not the United States considers a military campaign within the laws of warfare is a moot point to the ICC. In the case of the Iraqi Freedom operation, the United States was immune from ICC prosecution for reasons explained later in the paper but this will not always be the circumstance. In fact, prosecutor Carla Del Ponte of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was the model for the ICC, investigated NATO and U.S. leaders, including Bill Clinton, Madeline Albright and General Wesley Clark for alleged war crimes during the Serbia air campaign. Charges were dropped when the prosecutor concluded that she would not be able to obtain enough evidence to convict for the alleged crimes against humanity, but the damage was done with the assertion that the ICTY had jurisdiction.[1]

There is a potential for the ICC to have an impact on future U.S. operations. Defense Secretary Donald Rumsfeld stated in a Pentagon news release:

> By putting U.S. men and women in uniform at risk of politicized prosecutions, the ICC could well create a powerful disincentive for U.S. military engagement in the world. If so, it could be a recipe for isolationism--something that would be unfortunate for the world,

[*] The ICC is also referred to as the Rome statute since the meetings to develop the ICC took place in Rome.

> given that our country is committed to engagement in the world and to contributing to a more peaceful and stable world.[2]

The issue that operational commanders must be concerned with is the relationship among the United States, coalition partners, allies and the International Criminal Court. Further, they need to know what influence the ICC will have on conducting future operations.

Thesis

Although the United States has not ratified the ICC statute, the ICC may still impact our military operations in at least four ways. First, it may generate unfavorable political publicity for the United States as well as for individual commanders and military members secondary to investigations or indictments against military operations. Second, the obligations on commanders will likely increase to ensure all practical and reasonable measures are used to protect surrounding noncombatants and the environment. Third, it may make military personnel vulnerable to legal or political prosecution for perceived war crimes that occur in future operations conducted outside the United States. Fourth, it may complicate coalition warfare. *This paper will explore potential political and legal problems that could be caused by the ICC as well as consequences that may impact military operational commanders. Finally, it will pursue remedies to minimize these consequences*.

This thesis is current and relevant since the military is tasked to perform operations of various types throughout the world. In some missions, such as the recent Enduring Freedom operation, the rules of engagement were more complicated than in the past, with enemies often indistinguishable from non-combatants. Weapons are more lethal, yet precision-guided weapons are increasingly expected to destroy only combatants. Technological failures can result in devastating collateral damage, often under the world's gaze, provided by instantaneously televised reports. Commanders need to know what potential power the ICC

has over them and their service members and know how to protect themselves and their forces yet still be able to complete the mission.

In order to adequately understand this topic it is important to grasp aspects of the ICC at a strategic level and operational level.

The United Nations / ICC Position

The vision of a permanent international court first occurred in 1948 after the Nuremberg and Tokyo war trials. Interest within the United Nations waxed and waned over the next several decades. In the 1990s, atrocities in Rwanda and Yugoslavia caused the establishment of new tribunals to again address war crimes, and a renewed interest for a permanent court.[3] The United Nations proposed some strong arguments for the benefit of a permanent international criminal court. It argued that setting up temporary tribunals is an expensive, difficult and lengthy process often constrained by political issues. A standing court would be ready to investigate the worse cases of the "core" crimes over which they have jurisdiction whenever and wherever they occur. Those "core" crimes are:

- Crimes against humanity
- War crimes
- Genocide
- Crimes of Aggression

Other crimes may be added to their jurisdiction at a later date.[4] While the first three "core" crimes are well defined, the crime of aggression has not been defined. The United Nations believes the ratifying countries will eventually determine the definition. Not limited only to "core" crimes, the ICC may pursue a charge such as unlawful attack, as the ICTY did in Kosovo.[5] The Joan B. Kroc Institute for International Peace Studies argues that having a standing court would help deter horrific war crimes by giving notice that the ICC was ready to

investigate, try and punish appropriate violators unfettered by political issues. The Peace Study group also believes that a ready court is a deterrent to war crimes.[6]

Support of the ICC comes from many respected organizations such as the Red Cross, American Bar Association, Human Rights Watch and Amnesty International, as well as eighty-nine nations, including many allies of the United States. (Refer to Appendix A for a list of countries that have ratified the statute). One benefit of a standing court is that it provides another tool in the diplomatic toolbox. A second benefit is that it could be used as a legal enforcement option instead of costly military intervention or problematic economic sanctions to punish rulers that violate human rights.[7] Good idea or not, the ICC was ratified by the required sixty nations making it a reality. A group of eighteen international judges were sworn in on March 11, 2003 as the first judges to preside over the court.[8] (Refer to Appendix B for the list of judges and their nationality). On April 21 2003, Mr. Luis Moreno Ocampo from Argentina was elected as the ICC's first permanent prosecutor.[9]

The United States Position

Since the United States military contributes significant might to United Nations operations, it is at higher risk of prosecution based solely on the number of operations it performs. The United States' official position is that our forces deployed around the world should not face the increased danger of political prosecutions. The United States National Security Strategy of 2002 makes this policy clear:

> We will take the actions necessary to ensure our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept.[10]

Representative Christopher Smith (R-NJ), Vice Chair of the House International Relations Committee, in testimony on Capitol Hill, expressed concerns about the vagueness of the ICC

statute. He was specifically concerned that the definition for Genocide under Article 6 allowed for too much interpretation, especially relating to "causing mental harm to members of a group."[11] Article 6 of the Rome Statute/Treaty is:

> Genocide. For the purpose of this statute genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: a) Killing members of the group, b) Causing serious bodily or mental harm to the members of the group.…

Under Article 5, the ICC claims jurisdiction under the "crime of aggression," which is not yet defined by either the Rome accord or international law. Such vagueness in international law and politics can be dangerous especially in light of the amount of personal power given to the ICC prosecutors by the Rome statute. Under article 44, prosecutors are allowed to accept personnel supplied without cost by Non-Governmental Organizations (NGOs). Although many NGOs do great things some extremist NGOs may gain undo influence over the ICC prosecutor if personnel funded by those NGO's staff his office.[12] This could lead to serious problems for U.S. foreign policy. Representative Smith testified that he believed some NGOs had improper influence in the developmental process of the Rome statutes to the point of assuming the responsibility of negotiating for some countries.[13]

In an address to the General Assembly of the United Nations, Nicholas Rostow, General Counsel, U.S. mission to the United Nations explained that the United States has three areas of concern regarding the ICC that prevented it from ratifying the treaty. First, the United States is apprehensive about politically motivated prosecutions, which will be likely and possible given the ICC structure. Second, the area of jurisdiction, the definition of the crimes and lack of due process are all problematic. Finally, the ICC does not afford adequate Security Council review and veto power over potential cases.[14] The bottom line from the

United States view is that the court puts our forces and coalition forces at risk for politically motivated indictments and has the potential to negatively impact future operations.

ANALYSIS

Under the Rome Statute, the ICC has a two-track system of jurisdiction. Under the first track, jurisdiction would apply only when the United Nations Security Council (UNSC) refers a case. States would have to comply and surrender the accused persons under the power of Chapter VII of the United Nations Charter. The second track is applicable to cases referred to the ICC by either individual countries or by an ICC prosecutor. Unlike the first track, these indictments have no built in enforcement mechanism under the United Nations Charter but instead rely on the good faith of the state to turn the accused over to the court.[15] The UNSC can prevent a prosecutor from pursuing a case, but only with a majority vote of the permanent members affirming, and no veto is allowed to stop the court action.[16]

Political Concerns

Many experts agree that the United States is right to be concerned that the ICC could impact our ability to protect our national interests via military intervention and that some actions of the ICC may be political and hostile in nature. According to Rod Grams, former Senator and past Chairman, Senate Foreign Relations (1998) the ICC is a mechanism to try to dilute the power of the UNSC. By allowing the ICC prosecutors to initiate an investigation, anti-U.S. nations have gained a powerful political weapon against the United States, its' coalition partners and allies. Senator Grams stated, "this creates an international institution without checks or balances, accountable to no state or institution for its actions."[17] There is no appeal process regarding the decisions of the ICC to any higher authority. The decisions are final.

Political consequences do count. The Israeli Foreign Ministry believes that Israel has been in a political battle for years with the United Nations General Assembly, and now expects the ICC to become a politically motivated anti-Israel tool. For example, Arab countries were able to get the willful destruction of houses among the definitions of "crimes against humanity." Israel frequently uses home destruction as a retaliation measure against suicide bombers. The twenty-one Arab States and other Islamic countries constitute a majority that, in some cases, has allowed for the adoption of anti-Israel resolutions. There is a potential for this to occur with regard to the United States, its partners and allies.[18] NGOs such as some international human rights advocacy groups, have displayed an eagerness to find fault with democracies. For example, in 1999 Amnesty International (AI) criticized Australia's human rights practices two times more often than North Korea. Likewise, there was four times the criticism of the United States compared to Cuba and seven times the criticism of Israel versus Syria. The United Nations Human Rights Committee went on to declare that capital punishment in the United States was a violation of international human rights.[19] As mentioned earlier in this paper, NGOs such as AI will have influence on the ICC, since they will be allowed to support the prosecutor's office with gratis staff. Again, politics do count. As the leader of the democratic world, the United States is concerned about its image and the importance of promoting the laws of war. This image could suffer serious setbacks under the ICC if the court attempted to indict U.S. military and civilian officials involved in military operations under war crime statutes. Failure to cooperate would give the United States the appearance that it does not support the laws of war.

U.S. Constitutional Concerns

Besides the political issues mentioned above, there are some very disturbing U.S. constitutional issues regarding the potential impact on U.S. citizens and military personnel by the ICC. For the first time in U.S. history, an independent international court could punish an American citizen for what the court deems is a war violation when it occurred outside the United States. The Rome statute threatens the sovereignty of the United States, since the ICC judges and prosecutors would have the authority to request extradition of the accused, even though the United States is not a party. This concept runs contrary to U.S. republicanism, (i.e., those that exercise authority over citizens must be elected or appointed by the elected official).[20] While nations have the right to arrest and try anyone who has committed crimes against their citizens or crimes in their territory, the United States has never recognized this right of any international body, with the exception of the UNSC. For example, the United States agreed to the 1957 Status of Forces Agreement (SOFA) for military deployed overseas after it was deemed constitutional by the Supreme Court. The court found that:
"[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction."[21]

United States forces subject to the SOFA are so because the United States supports the jurisdiction of that country for any crimes committed in its territory. This jurisdiction is territorial jurisdiction, the primary basis of international legal authority, which has been upheld by hundreds of years of practice. The ICC is not based on this tradition of law but instead promotes "universal jurisdiction." This means that the ICC has jurisdiction over citizens of all countries, whether they have signed the accord or not, if the person commits a war crime in the territory of a ratifying country.[22] An interesting legal situation has just

recently occurred in Belgium that highlights the danger of universal jurisdiction. A lawyer at the behest of ten Iraqis is preparing a case to take to a court in Brussels charging General Franks for war crimes that occurred during Operation Iraqi Freedom. This indictment can occur because Brussels approved universal jurisdiction in 1993. Universal jurisdiction gave the courts jurisdiction to try non-Belgians for war crimes that occurred anywhere in the world. This case has angered Washington and may create huge diplomatic ramifications. Belgium did amend the 1993 law to make political motivated trials against high-level politicians more difficult. However, the protection does not extend to military leaders.[23]

Impact on Military Operations

Effective June 2002, the UNSC issued a one year exemption from ICC jurisdiction, for U.S. forces participating in United Nations peacekeeping operations. There is hope that the UNSC will renew the exemption again this year. In 2002, President Bush was so concerned with the potential legal ramifications against U.S. forces that he threatened to pull them from the Bosnia-Herzegovina peacekeeping operation unless the exemption was granted.[24] So, for now, the U.S. military and its leaders are exempt from the jurisdiction of the ICC for United Nations sponsored actions. The picture is more uncertain for two other types of operation. First, non- United Nations sponsored actions, such as those United States and Britain recently conducted in Iraq will probably be at a greater risk of being singled out for prosecution in the future. "Iraqi Freedom" is currently exempt from the ICC jurisdiction since Iraq was not a party to the statute, and the year exemption from jurisdiction is still in place for U.S. forces. Second, military operations with allies and coalitions who have signed the treaty may be more difficult if they feel obligated to turn U.S. military over to the ICC, even against U.S.

objections. This could create some political and diplomatic problems for all countries involved.

Some might ask why the U.S. military needs to be concerned about war crimes if we conduct ourselves according to the laws of war. The answer is that crimes against humanity and crimes of aggression are not well defined or yet agreed upon by the ICC. By its very nature, military action is aggressive and violent. There is the potential for certain groups to attempt to embarrass the United States military and its leaders for their involvement in a military action. Commanders who order military operations in the future have, at the very least, a potential of being indicted, just as General Wesley Clark and other NATO leaders almost were during the Kosovo air campaign.[25] An example of how this could occur came from the ICTY. It pursued the charge of "unlawful attack" against a Bosian-Croation military leader General Blaskic (Prosecutor *v. Tihomir Blaskic*). The General was charged and convicted for actions that pertained to excessive injury and death to civilians from military operations around civilian populations.[26] How does this indictment transfer to the increased risk for U.S. commanders? It underscores the importance of commanders taking seriously the obligation of minimizing collateral damage. Obviously, if the United States believed that one of it military members committed a war crime it would try them. If the United States refused to try the case for whatever reason, the ICC is legally allowed to request jurisdiction and attempt to prosecute. It is hard to imagine that the United States would ever turn over a military member to the international body,[*] but the indictment by that international body would, by itself, prove embarrassing to the United States. It could also create a sensitive political situation if the accused U.S. military member was stationed in a signatory nation's

[*] Refer to The American Service-Members Protection Act, discussed on p. 14 under "Recommendations."

territory. This could produce dicey political issues for both countries and could lead to a deterioration of military cooperation should the ICC pressure that territory into extraditing the American. One of the worst outcomes of this treaty may be that it makes our ability to fight the Global War on Terror and enforce human rights more difficult. This is ironic in that this is the very opposite thing that the Treaty was trying to accomplish.[27] If the ICTY is an indicator, the ICC at the very least will put an additional burden on commanders as it attempts to hold them responsible for collateral damage against civilian populations.

COUNTERARGUMENTS

There are many respected groups that believe the United States is overly concerned about the potential negative affects and not looking at the greater good of the court. Indeed many believe that the Court furthers important U.S. national interests. In testimony to the Senate Foreign Relations Committee, the Lawyers Committee for Human Rights said that the treaty supported American values in four ways.

1. The court will help protect human rights and advance the rule of law.

2. The court will act as a deterrent to future violation by its very presence and may decrease the need for peacekeeping operations.

3. The deterrent effect will expand U.S. security and will result in a more stable world order.

4. The court will support the importance of the international legal framework and law.[28]

The Lawyers Committee for Human Rights also believes the threat to U.S. service members is overstated because the ICC is a court of last resort and will only deal with the worst type of war crimes. These types of crimes would be of concern to all civilized countries and the United States would want violators tried for these heinous actions. Support by the United States of the ICC would show that this country truly upholds the laws of war. Most of

the United Nations members believe that there are safeguards within the ICC to ensure the highest levels of fairness, impartiality and significant due process. United States service members are at minimal risk since in the rare event that a U.S. service member was accused of a war crime, the ICC would have to refer the case over to U.S. military jurisdiction first.[29] Perhaps the ICC would not have jurisdiction if the member were tried in the United States (or by local authorities), because the Court's jurisdiction is based on a concept called "complementarity." This means the ICC is a court of last resort and would have jurisdiction only when local authorities of a nation state are unable or unwilling to prosecute.[30] As a final safety measure that should prevent politically motivated cases, the Security Council can adopt a resolution suspending the prosecution of any ICC case.[31] Briefs presented by the Joan B. Kroc Institute for International Peace Studies support the above arguments. They maintain that it is fundamentally unfair for the United States to support the temporary tribunals of the past simply because they were limited to investigating only non-U.S. citizens. Supporters for the ICC claim that existing laws that form the temporary tribunals have not been changed, but will now be better enforced by a permanent Court. Therefore, it is in U.S. interests as the sole democratic superpower to encourage countries to support international law enforcement. Failure to do so could find the United States inadvertently sending the message that humanitarian international laws are not impartial and are politically motivated. This is an allegation the likes of Milosevic, Qadafi and other despots have claimed.[32]

Although pro ICC arguments are compelling, they fail to address the political reality of the changing state of the United Nations and the world. Many of the smaller countries and some NGOs are looking at the ICC as a way of leveling the playing field with the UNSC and the Western powers. Unfortunately, the pro ICC arguments do not do anything to address this

concern nor the anxiety that prosecutions may be politically motivated with minimal checks and balances to hold them accountable.

RECOMMENDATIONS

At the Strategic Level

The Court is here and is not going away. There are, however, some things the United States can do to minimize the risk to U.S. citizens and military personnel involved in future military operations. Most of these solutions will need to come from the strategic level. Currently, the United States has a one-year renewable exemption from ICC jurisdiction. The administration must continue to seek an extension of this exemption for the second year and beyond. The way the statute is written, the exemptions cannot be longer than a single one-year at a time. The United States should work within the United Nations to change this to a permanent exemption, however this may be quite difficult. When possible, the U.S. military should not send forces on United Nations peacekeeping operations unless they are exempt from the prosecution of the ICC. Other military actions may not have this luxury. President Bush made it clear that he did not support the Rome statute when he expunged President Clinton's signature from the document.[33] Future presidents and Congress should never sign or ratify the Rome statute nor should they recognize its power over U.S. military and civilian leaders. House Resolution 4775, the American Service-Members Protection Act was recently passed by Congress and signed by President Bush. This bill prohibits responding to requests for extradition of any person from the United States to the ICC and denies the use of funds or support of any ICC investigation in U.S. territories or the United States. It also gives authority to the president to use of all means necessary to bring about the release of any ICC detained member of the U.S. armed forces and "certain other persons."[34] Another technique at

the strategic level that the United States is pursuing to protect military members is called Article 98 agreements. Under these agreements, named for Article 98(2) of the Rome accord, the United States is attempting to attain bilateral agreements with friendly states not to surrender U.S. citizens or allies to the ICC. Although, the ICC takes issue with the Article 98 agreements, Pierre-Richard Prosper, the current U.S. ambassador-at-large for war crime issues, believes good progress is being made on the agreements and that they are based on sound legal foundations.[35] On May 2, 2003, Secretary of State Colin Powell and Albanian Prime Minister Fatos Nano signed an Article 98 agreement. This agreement makes Albania the 32d country to sign an Article 98 agreement with the United States.[36] Last, the United States should work within the Security Council to renegotiate the statutes to include a veto power over ICC indictments by the UNSC permanent members. This will be a difficult task to accomplish since most of the United Nations membership does not support this change. One method the United States could utilize is to withhold funds from the United Nations until the ICC statutes are changed.

At the Operational Level

Operational commanders must be aware of the importance of the ICC statute on future military operations. The danger to service members and commanders is not from being extradited to stand trial, since the U.S. government would most likely not allow that to occur. The real risk is the political fallout and embarrassment that these actions would cause the United States. In order to minimize the possibilities of indictment, the operational commander must have well-articulated and comprehensive rules of engagement (ROE). Further he must ensure that his forces are knowledgeable of the laws of war as well as the ROE and train to the guidelines of both. The position of the legal advisors to commanders

has taken on new importance. It appears that as technology of warfare changes so do the increasing obligations of commanders to obtain accurate information on non-combatant situations and reasonably protect those non-combatants. As noted earlier, the ICTY tried General Blaskic for "unlawful attack." Pertinent findings were that commanders ordering an attack had the duty to weigh military necessity and show diligence in establishing the legitimacy of the target. Commanders were also expected:

> a) To do everything practicable to verify that the objectives to be attacked are military objectives.
> b) To take all practicable precautions in the choice of methods and means of warfare with a view to avoid or minimizing incidental civilian casualties or property.
> c) To refrain from launching attacks that may be expected to cause disproportionate civilian casualties or civilian property damage.[37]

There may not be enough doctrinal tools or training available to give the operational commander the knowledge needed to avoid fault in future operations. Doctrine must prepare operational commanders to fight in environments such as urban warfare, where the civilian population is at increased physical risk and the commander is at an increased legal risk. Unless this occurs, the ROE may be too restrictive to allow accomplishment of the mission. General Wesley Clark, in studying the Serbian operation, found that the ROE interpretation frequently put commanders in the difficult and frustrating situation of choosing mission completion versus increased risk of collateral damage.[38] Training and doctrinal support will also be important in peace keeping operations. No matter what the operation, forces will need to be well trained, supported doctrinally and knowledgeable of the laws of war. Commanders will need to be made aware of situations where significant legal problems could be encountered and know how best to act to protect their forces and non-combatants, while still being able to carry out the mission. Operational commanders must request that work is done at the strategic level to make the changes in the ICC statutes to protect U.S. forces and

coalition forces. Until safeguards are in place, they must advise strategic level leaders to restrict the use of U.S. forces on UN operations unless exempt from the ICC statutes.

The ICC is now an important part of the international arena; how active or apolitical it will be is yet to be seen. The potential is there for unsympathetic countries and NGOs to challenge the United States and its allies through the ICC, using it for political gain. We cannot let the agenda of other countries or NGOs, working through the ICC or any agency, interfere with important U.S. foreign policy objectives.

APPENDIX A

As of 10 March 2003, 89 countries have ratified the Rome Statute of the International Criminal Court. Out of them 21 are African Countries, 21 are from Europe (non EU countries), 18 are from Latin America and the Caribbean, 15 are EU member States, 12 are from Asia and the Pacific, 1 is from North America, 1 is from the Middle East.

A
Afghanistan
Albania
Andorra
Antigua and Barbuda
Argentina
Australia
Austria

B
Barbados
Belgium
Belize
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Bulgaria

C
Cambodia
Canada
Central African Republic
Colombia
Costa Rica
Croatia
Cyprus

D
Democratic Republic of Congo
Denmark
Djibouti
Dominica

E
East Timor
Ecuador
Estonia

F
Fiji
Finland
France

G
Gabon
Gambia
Germany
Ghana
Greece

H
Honduras
Hungary

I
Iceland
Ireland
Italy

J
Jordan

L
Latvia
Lesotho
Liechtenstein
Luxembourg

M
Macedonia
Malawi
Mali
Malta
Marshall Island
Mauritius
Mongolia

N
Namibia
Nauru
Netherlands
New Zealand
Niger
Nigeria
Norway

P
Panama
Paraguay
Peru
Poland
Portugal

R
Republic of Korea
Romania

S
Saint Vincent and The Grenadines
Samoa
San Marino
Senegal
Serbia and Montenegro
Sierra Leone
Slovakia
Slovenia
South Africa
Spain
Sweden
Switzerland

T
Tajikistan
Tanzania
Trinidad and Tobago

U
Uganda
United Kingdom
Uruguay

V
Venezuela

Z
Zambia

Non-signatories: China, Cuba, North Korea, Iraq, Libya, Burma, Pakistan, and USA.
Source: ICC Home page, Available [Online]: <http://www. icc-cpi.int/statesparty/allregion.php> [8 May 2003]

APPENDIX B

Elected Judges

Name (round elected)
Nationality
Gender
Term of office

1.
CLARK, Maureen Harding (1st)
Ireland
Female
9 years

2.
DIARRA, Fatoumata Dembele (1st)
Mali
Female
9 years

3.
FULFORD, Adrian (9th)
United Kingdom
Male
9 years

4.
HUDSON-PHILLIPS, Karl T. (3rd)
Trinidad and Tobago
Male
9 years

5
JORDA, Claude (33rd)
France
Male
6 years

6.
ODIO BENITO, Elizabeth (1st)
Costa Rica
Female
9 years

7.
PIKIS, Gheorghios M. (4th)
Cyprus
Male
6 years

8
SLADE, Tuiloma Neroni (28th)
Samoa
Male
3 years

9.

SONG, Sang-hyun (1st)
Republic of Korea

Male
3 years

10.
STEINER, Sylvia H. de Figueiredo (1st)
Brazil

Female
9 years

1.
BLATTMANN, René (13th)
Bolivia

Male
6 years

2.
KAUL, Hans-Peter (9th)
Germany

Male
3 years

3.
KIRSCH, Philippe (4th)
Canada

Male
6 years

4.
KOURULA, Erkki (4th)
Finland

Male
3 years

5.
KUENYEHIA, Akua (1st)
Ghana

Female
3 years

6.
PILLAY, Navanethem (1st)
South Africa

Female
6 years

7.
POLITI, Mauro (21st)
Italy

Male
6 years

8.
USACKA, Anita (9th)
Latvia

Female
3 years

Source: Rome Statute of the ICC, Available [Online]:< http://www. un.org/law/icc/index.html> 23 April 2003.

NOTES

[1] Congress, Senate, Committee on Foreign Relations, *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution*, Hearing, 106th Congress, 2nd sess., U.S. Government Printing Office, 14 June 2000. Available [Online]: <http://www. acess.gpo.gov.congress/senate> (S. Hrg. 106-769) [25 March 2003], 3.

[2] United States Department of Defense, "Secretary Rumsfeld Statement on the ICC Treaty," 6 May, 2002, News Release, Available [Online]: < http://www.defenselink.mil> [27 March 2003], 2.

[3] United Nations, "Rome Statute the International Criminal Court," 23 April 2003, Available [Online]: <http://www. un.org/News/facts/iccfact.htm> [8 May 2003].

[4] Schiff, Ben, "War Crimes and Truth Commissions: Constructing International Morality and Constraining the State," International Studies Association, March 1998, Columbia International Affairs Online (CIAO)/Policy Briefs and Economic Indicators, Available [Online]: < http://www.ciaonet.org> [20 March 2003], 10.

[5] United Nations, "Rome Statute of the International Criminal Court," 12 July 1999, Available [Online]: <http://www. un.org/law/icc/statute/99_corr/2.htm> [9 April 2003]

[6] Robert C. Johansen, "U.S. Opposition to the International Criminal Court: Unfounded Fears," Joan B. Krock Institute for International Peace Studies, June 2001, Columbia International Affairs Online (CIAO)/Policy Briefs and Economic Indicators. Available [Online]: < http://www.ciaonet.org> [20 March 2003], 1.

[7] Ibid., 4.

[8] "International Criminal Court to be Inaugurated," *M2 PRESSWIRE*, March 10, 2003, Available [Online]: LexisNexis Academic, <http://www.lexis-nexis.com/universe/document > [25 March 2003], 1.

[9] United Nations, "Rome Statute of the International Criminal Court," 23 April 2003, Available [Online]: <http://www. un.org/law/icc/index> [8 May 2003]

[10] National Security Strategy of the United States of America, 17 September 2002, The White House, Washington D. C., Available [Online]: < http://www. whitehouse.gov/nsc/nssall.html > [9 April 2003].

[11] Christopher Smith, "Testimony," Congress, House, Committee on International Relations, *International Criminal Court:* Hearing, 106th Congress, 2nd sess., 26 Jul 2000, Available [Online]: <LexisNexis Congressional (CIS 2001-H461-39) >. [20 March 2003], 3.

[12] Ibid., 4

[13] Ibid., 19.

[14] Nicholas Rostow, "Statement," United States Mission to the United Nations, "U.S. Restates Objections to International Criminal Court," 15 October 2002, Available [Online]: < http://www.un.int/usa/02print_153.htm > [11 April 2003].

[15] Michael P. Scharf, "Testimony," Congress, Senate. Committee on Foreign Relations, *International Operations U.N. International Criminal Court: Hearing*, 105 Congress, 2nd sess., 23 Jul 1998, Available [Online]: <LexisNexis Congressional > Search: ICC. [11 April 2003].

[16] Rod Grams, "Testimony," Congress, Senate, Committee on Foreign Relations, *International Operations U.N. International Criminal Court: Hearing*, 105 Congress, 2nd sess., 23 Jul 1998, Available [Online]: <LexisNexis Congressional > Search: ICC. [11 April 2003].

[17] Ibid., 3.

[18] Jeremy Rabkin, "Testimony," United States Congress, Senate, Committee on Foreign Relations, *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution*, Hearing, 106th Congress, 2nd sess., U.S. Government Printing Office, 14 June 2000. Available [Online]: <http://www. acess.gpo.gov.congress/senate> (S. Hrg. 106-769) [25 March 2003], 16.

[19] Ibid., 19.

[20] Lee A. Casey, and David Rivkin, "When in the Rome Treaty… Get Out and Get Out Now," *National Review Online*, 16 April 2002, Available [Online]: < http://www. nationalreview.com/script/printpage.asp?ref=flashback/flashback-rivkin041602.asp> [27 March 2003], 2.

[21] Lee A.Casey, "Assessments of the United States Position: The Case Against the International Criminal Court," *Fordham International Law Journal*, March 2002, Available [Online]: LexisNexis Academic: <http://web.lexis-nexis.com/universe > [25 March 2003], 5.

[22] Ibid., 6.

[23] Loredano Vuoto, "General Franks is Not a War Criminal," *Washington Times*, 8 May 2003, Available [Online]: <http://ebird.dtic.mil/May2003/e20030508183632.htm > [13 May 2003].

[24] "Myths and Facts About the International Criminal Court," *Human Rights Watch, 2001*, Available [Online]: < http://www.hrw.org.campaigns/icc/facts/htm > [25 March 2003], 1.

[25] "Notice of the International Criminal Tribunal for the Former Yugoslavia, Request to Investigate Named Individuals," Foreign Ministry of the Former Yugoslavia, 6 May 1999, Available [Online]: <http://jurist.law.pitt.edu/icty/htm > [15 April 2003], 2.

[26] Richard, J. Butler, "Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century?" *PARAMETERS, US Army War College Quarterly*, Spring 2002, 49.

[27] Rod Grams, Testimony, 2.

[28] Lawyers Committee for Human Rights, "Statement," Congress, Senate, Committee on Foreign Relations, *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution*, Hearing, 106th Congress, 2nd sess., U.S. Government Printing Office, 14 June 2000, Available [Online]: <http://www. acess.gpo.gov.congress/senate> (S. Hrg. 106-769) [25 March 2003], 39.

[29] Ibid., 40, 41.

[30] Scharf, Testimony.

[31] "Myths and Facts About the International Criminal Court," *Human Rights Watch, 2001*, Available [Online]: < http://www.hrw.org.campaigns/icc/facts/htm > [25 March 2003], 1.

[32] Robert C. Johansen, "U.S. Opposition to the International Criminal Court: Unfounded Fears," Joan B. Kroc Institute for International Peace Studies, Columbia International Affairs Online (CIAO)/Policy Briefs and Economic Indicators, Policy Brief No. 7, June 2001, Available [Online]: http://www. ciaonet.org/coursepack/cp05/cp05d/html > [16 April 2003], 1-4.

[33] It was previously signed by President Clinton, but not ratified by Congress.

[34] United States Congress, House, *American Service-Members Protection Act of 2002*, 107th Congress, 2nd sess., H.R. 4775, Congressional Record, SEC, 2001-2015, Available [Online]: <http://www.iccnow.org/pressroom/factsheets > [26 March 2003].

[35] Richard-Pierre Prosper, "Prosper Sees Good Progress With Article 98 Bilateral Agreements," United States Department of State International Information Programs, 24 September 2002, Available [Online]: <http://www. usinfo.state.gov> [27 March 2003].

[36] Guy Dinmore, "Washington Presses Ahead with War Crime Deals," *London Financial Times*, 8 May 2003, Available [Online]: <http://news.ft.com/home> [8 May 2003].

[37] Butler, 49.

[38] Ibid., 45.

SELECTED BIBLIOGRAPHY

Bowens, Glenn. "Legal Issues in Peace Operations." *PARAMETERS, US Army War College Quarterly*. (Winter 1998): 13-14. Available [Online]: <http://carlisle-www.army.mil/usawc/Paramerters/98winter/bowens.htm> [25 March 2003]

Butler, Richard, J. "Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century?" *PARAMETERS, US Army War College Quarterly*. Spring 2002. Available [Online]: <http://carlisle-www.army.mil/usawc/Paramerters/02 Spring/butler.htm> [25 March 2003]

Casey, Lee A. "Assessments of the United States Position: The Case Against the International Criminal Court." *Fordham International Law Journal*. March 2002. Available [Online]: LexisNexis Academic: <http://web.lexis-nexis.com/universe > [25 March 2003]

Casey, Lee, A. and David Rivkin. "When in the Rome Treaty… Get Out and Get Out Now." *National Review Online.* 16 April 2002. Available [Online]: < http://www. nationalreview.com/script/printpage.asp?ref=flashback/flashback-rivkin041602.asp> [27 March 2003]

Davidson, Michael, J. "Staff Officer Responsibility for War Crimes." Military Review. 81, no. 2 (March-April 2001): 2-9

Foreign Ministry of Former Yugoslavia. "Notice of the International Criminal Tribunal for the Former Yugoslavia, Request to Investigate Named Individuals." 6 May 1999. Available [Online]: <http://jurist.law.pitt.edu/icty/htm > [15 April 2003].

Gilmore, Gerry J. "U.S. Troops Continue Bosnia Mission, Despite ICC Concerns." *American Forces Information Services.* 2 July 2002. Available [Online]: <http://www. defenselink.mil > [27 March 2003]

"International Criminal Court to Be Inaugurated." *M2 PRESSWIRE*. March 10, 2003. Available [Online]: LexisNexis Academic. <http://www.lexis-nexis.com/universe/document > [25 March 2003]

Johansen, Robert C. "U.S. Opposition to the International Criminal Court: Unfounded Fears." Joan B. Krock Institute for International Peace Studies. June 2001. Columbia International Affairs Online (CIAO)/Policy Briefs and Economic Indicators. Available [Online]: < http://www.ciaonet.org> [16 April 2003]

Kissinger, Henry A. "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny." *Foreign Affairs.* (July/August 2001): 86-96.

"Myths and Facts About the International Criminal Court." *Human Rights Watch. 2001.* Available [Online]: < http://www.hrw.org.campaigns/icc/facts/htm > [25 March 2003]

"National Security Strategy of the United States of America." 17 September 2002. The White House. Washington D. C. Available [Online]: < http://www. whitehouse.gov/nsc/nssall.html > [9 April 2003].

Pejic, Jelena. "The International Criminal Court Statute: An Appraisal of the Rome Package." *The International Lawyer.* 34, no. 1. (Spring 2000): 65 – 84.

Prosper, Richard-Pierre. "Prosper Sees Good Progress with Article 98 Bilateral Agreements." United States Department of State International Information Programs. 24 September 2002. Available [Online]: <http://www. usinfo.state.gov> [27 March 2003]

Reheuser, Michael, E. "The International Criminal Court: How a Good Idea Became a Terrible Treaty." *Marine Corps Gazette.* 85, no. 10 (October 2001): 48, 49.

Rabkin, Jeremy. "A Dangerous Step Closer to an International Criminal Court." American Enterprise Institute. January 2001. Columbia International Affairs Online (CIAO)/Policy Briefs and Economic Indicators. Available [Online]: < http://www.ciaonet.org> [20 March 2003]

Sabom, Diane. "ICC Fails Tests of American Justice. Proquest. 27 May 2002. Available [Online]: <http://www. proquest.umi.com> [27 March 2003]

Schiff, Ben. " War Crimes and Truth Commissions: Constructing International Morality and Constraining the State." International Studies Association. March 1998. Columbia International Affairs Online (CIAO)/Policy Briefs and Economic Indicators. Available [Online]: < http://www.ciaonet.org> [20 March 2003]

Taylor, Stuart. "Courting Trouble." *Legal Times.* 8 April 2002. Available [Online]: <http://web.lexis-nexis.com/universe/document> [27 March 2003]

United Nations. "Rome Statute of the International Criminal Court." 12 July 1999. Available [Online]: <http://www. un.org/law/icc/statute/99_corr/2.htm> [9 April 2003]

United Nations. "Rome Statute of the International Criminal Court." 23 Apr 2003. Available [Online]: <http://www. un.org/News/facts/iccfact.htm> [8 May 2003].

United States Congress. House. Committee on International Relations. *International Criminal Court:* 106th Cong., 2nd sess. Hearing. 26 Jul 2000. Available [Online]: <LexisNexis Congressional> Search: (CIS 2001-H461-39) [20 March 2003]

United States Congress. House. *American Service-Members Protection Act of 2002*. 107th Cong., 2nd sess., H.R. 4775. Congressional Record. SEC. 2001-2015. Available [Online]: <http://www.iccnow.org/pressroom/factsheets > [26 March 2003]

United States Congress. Senate. Committee on Foreign Relations. *International Operation U.N. International Criminal Court.* 105th Cong., 2nd sess. Hearing. 23 July 1998. Available [Online]: <LexisNexis Congressional > Select: Hearings-Senate. Search: ICC [11April 2003].

United States Congress. Senate. Committee on Foreign Relations. *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution.* Hearing. Washington, DC: U.S. Government Printing Office, 14 June 2000. Available [Online]: <http://www. acess.gpo.gov.congress/senate> (S. Hrg. 106-769) [25 March 2003]

United States Department of Defense. "Secretary Rumsfeld Statement on the ICC Treaty." 6 May, 2002. News Release. Available [Online]: < http://www.defenselink.mil> [27 March 2003]

United States Department of State. "American Foreign Policy and the International Criminal Court." 6 May 2002, by Marc Grossman. Available [Online]: <LexisNexis.universe/document > Search: International Criminal Court [17 April 2003].

United States Department of State. "U.S. Continues to Seek Article 98 Agreements on ICC." 14 August 2002, by Philip Reeker. Available [Online]: <http://usinfo.state.gov/topical/rights/law/02081435.htm > [27 March 2003].

United States Mission to the United Nations. "U.S. Restates Objections to International Criminal Court." 14 October 2002. Statement by Nicholas Rostow. USUN Press Release #153 (02). Available [Online]: <http://www.un.int/usa/02print_153.htm > [11 April 2003].

Vetter, Greg R. "Command Responsibility of Non-Military Superiors in the International Criminal Court." *The Yale Journal of International Law.* 25, no. 89, (Winter 2000): 89 – 143.

Waxman, Matthew. "International Law and the Politics of Urban Air Operations." RAND. 2000. Available [Online]: <http://www.rand.org/publications/MR/MR1175> [24 March 2003]

Wedgewood, Ruth. "Fiddling in Rome, America and the International Criminal Court." *Foreign Affairs.* (November/December 1998): 20- 24.